

**BEFORE THE
UNITED STATES DEPARTMENT OF TRANSPORTATION
PIPELINE AND HAZARDOUS MATERIALS SAFETY ADMINISTRATION
OFFICE OF THE ADMINISTRATOR**

In the Matter of:

**Warehouse Nail & Beauty Supply,
Respondent.**

**PHMSA Case No. 03-252-SB-SO
DMS Docket No. PHMSA-2005-22678-3**

DECISION ON APPEAL

I. Procedural History

On October 6, 2005, the Chief Counsel of the Pipeline and Hazardous Materials Safety Administration (PHMSA), U.S. Department of Transportation (DOT), issued an Order¹ to Warehouse Nail & Beauty Supply (Respondent) finding Respondent had knowingly committed four violations of the Hazardous Materials Regulations (HMR), 49 C.F.R. Parts 171-180, and assessing a civil penalty in the amount of \$10,775. In accordance with PHMSA's regulations, Respondent had twenty (20) days from the receipt of the Order to file an appeal with this office. Respondent filed a response to the Chief Counsel on November 4, 2005.²

II. Summary

In this appeal, Respondent requests waiver of the penalty in consideration of Respondent's corrective actions, small size and inability to pay. Upon further review of the record, I am granting the appeal in part and reducing the amount of the civil penalty assessed by the Chief Counsel.

¹ Order, DMS Docket No. PHMSA-2005-22678-1 (Oct. 6, 2005) at <http://dms.dot.gov/>.

² The filing date for an appeal is the date received by PHMSA. The Federal Rules of Civil Procedure provide that three days be added to the prescribed period if a paper is served by mail. Fed. R. Civ. Proc. 6(e). Twenty days after

III. Background

This case arises from a July 26, 2002 compliance inspection performed at Respondent's facilities in Atlanta, Georgia. Based on documents provided by Respondent, the inspector discovered Respondent had shipped hazardous materials in quantities requiring placarding. However, Respondent was not registered as an offeror of hazardous materials, had not provided hazardous materials training to its employees, and was shipping hazardous materials under shipping papers that did not include a valid emergency response telephone number and in unauthorized, non-UN standard packagings.

Based on a preliminary assessment of the apparent nature, circumstances, extent, and gravity of the probable violations in the inspector's report, on January 15, 2003, the Office of Chief Counsel issued a Notice of Probable Violation (Notice) to Respondent, which proposed a civil penalty in the amount of \$11,250 for four violations of the HMR.³

In its informal response to the Notice, Respondent detailed its corrective actions. In later correspondence with the Office of Chief Counsel, Respondent provided limited financial information. The Office of Chief Counsel requested additional information, as the information Respondent had provided was insufficient to warrant a reduction based on an inability to pay or economic harm to the company. Respondent did not submit any additional financial information. In his Order, the Chief Counsel considered the statutory criteria, including the evidence of Respondent's corrective actions and the limited financial information available.

the date of receipt was November 1, 2005; therefore, November 4, 2005, was the last day for timely filing of an appeal in this case.

³ The proposed assessment in the Notice included a \$1,850 reduction for Respondent's corrective actions prior to issuance of the Notice.

IV. Discussion

Respondent appeals the Order and seeks waiver of the assessed penalty. Respondent raises the same arguments it raised in prior correspondence. Respondent states it has corrected the four violations. In addition, Respondent asserts it is a small business and is unable to pay the assessed penalty.

The Chief Counsel considered Respondent's evidence of corrective action and granted a total reduction of \$2,325 from the recommended baseline penalties. The Chief Counsel granted a fifteen percent (15%) reduction for the packaging and training violations, stating Respondent's evidence of corrective action did not fully address the violations. The Chief Counsel granted a twenty-five percent (25%) reduction for the two remaining violations.⁴ Upon further review of the corrective action, Respondent appears to have fully addressed the packaging violation; therefore, I am reducing the penalty for the packaging violation by twenty-five percent (25%) from the recommended baseline penalty.⁵ Respondent did not submit any additional evidence of corrective action for consideration with its appeal.

The record shows Respondent submitted limited financial information. Respondent did not reply to the request of the Office of Chief Counsel for additional information. Because the information provided did not demonstrate Respondent would be unable to pay the proposed penalty or continue in business, the Chief Counsel did not adjust the penalty for financial hardship.

V. Findings

I find the Chief Counsel correctly determined Respondent committed four violations of the HMR. In addition, I find no error in the Chief Counsel's determinations for mitigation based

⁴ The Guidelines for Civil Penalties recommended a maximum reduction of twenty-five percent for corrective actions.

on corrective actions for three of the four violations. I find Respondent's corrective actions with regard to the packaging violation warrant a twenty-five percent reduction from the recommended baseline. Although Respondent failed to provide adequate evidence of financial hardship, the financial evidence provided is not indicative of a strong business. Therefore, I am further reducing the penalty for financial hardship by \$5,000.


Respondent's appeal is granted. I order Respondent to pay the revised civil penalty of \$4,975.

VI. Payment

Respondent must pay the \$4,975 civil penalty within thirty (30) days of the date of this Decision on Appeal. See Addendum A for payment information.

VII. Final Administrative Action

This Decision on Appeal constitutes the final administrative action in this proceeding.



Stacey Gerard for
Thomas J. Barrett
Administrator

Date Issued:

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

⁵ The revised civil penalty for the packaging violation (Violation 1 in the Notice and Order) is \$6,000.